United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

76-7455

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 72-2573

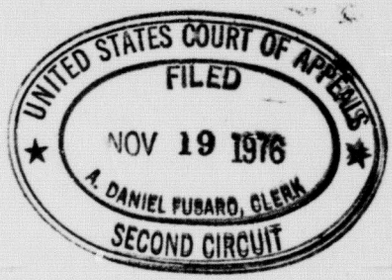
B
P/S

SYNTAX TIME SHARING, LTD., and ALBERT L. BARKSDALE, JR., individually and as agent of SYNTAX TIME SHARING, LTD.,

Plaintiffs-Appellants,

-against-

MAX SIRKUS, as CALENDAR CLERK OF THE SUPREME COURT NEW YORK COUNTY, CHASE MANHATTAN BANK, N.A., WILLARD COHEN, and ROBERT BREAKSTONE, individually and as agents of CHASE MANHATTAN BANK, N.A.,



Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANTS-APPELLEES THE CHASE MANHATTAN BANK, N.A., AND WILLARD COHEN

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STATEMENT OF THE ISSUE

The issue before this Court is whether the District Court correctly dismissed the complaint in this action for lack of subject matter jurisdiction.

STATEMENT OF THE CASE

This appeal is from a judgment of the United States District Court for the Southern District of New York, dated August 20, 1976 (A-35)*, pursuant to the decision of Hon. Inzer B. Wyatt (A-34), granting the motion of Defendants-Appellees The Chase Manhattan Bank, N.A. and Willard Cohen, pursuant to Rule 12(b)(1) and Rule 12(b)(6) of the Federal Rules of Civil Procedure, for an order dismissing the complaint on the ground that the District Court lacked jurisdiction over the subject matter thereof, or in the alternative, on the ground that the complaint failed to state a claim upon which relief can be granted.

THE COMPLAINT

In substance, the complaint sought declaratory relief and damages for non-descript violations of Plaintiffs-Appellants' rights under the Fifth, Seventh, Ninth, Thirteenth and Fourteenth Amendments to the Constitution of the United States (A4-A5 Complaint, ¶¶ 1-2); and alleged in this connection, that in July, 1972, Plaintiffs-Appellants commenced an action against Defendants-Appellees Chase, Cohen and Breakstone in the Supreme Court of the State of New York, County

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*All "A" references are to Plaintiffs-Appellants' Appendix.

of New York ("the State Action") (A6, Complaint ¶ 11); in December, 1973, Chase, Breakstone and Cohen wrongfully filed a Note of Issue and statement of readiness (A6-A7, Complaint, ¶¶ 9; 16-18) which Plaintiffs-Appellants had vacated by way of motion in the State Action (A6, Complaint, ¶ 12); and, almost three years later, during March, 1975, Plaintiffs-Appellants attempted to file their own Note of Issue which contained a demand for a jury, with a statement of readiness, both of which were rejected by the Calendar Clerk of the Supreme Court of the State of New York, County of New York ("Calendar Clerk") (A6, Complaint ¶¶ 13-14).

As a result of the foregoing, the complaint apparently claimed that Plaintiffs-Appellants somehow had been deprived of their right to a trial by jury in the State Action as afforded to them under the Seventh Amendment to the Constitution of the United States (A7, Complaint, ¶ 15) and that Plaintiffs-Appellants somehow were deprived of other unspecified rights as defined in the Fifth, Seventh, Ninth, Thirteenth and Fourteenth Amendments to the Constitution of the United States, Article 3, Section 2 of the Constitution of the United States, Civil Practice Law and Rules, §§ 601, 4101 and 4102(c), and Article 1, Section 2 of the New York State Constitution. (A7, Complaint, ¶¶ 19-20; A8, Complaint, ¶26).

The Complaint sought declaratory relief and damages pursuant to the provisions of 28 U.S.C. §§ 2201 and 2202

(A4, Complaint, ¶ 1).

ARGUMENT

THE COMPLAINT FAILED TO ALLEGE FACTS SUFFICIENT TO CONFER JURISDICTION ON THE DISTRICT COURT.

The District Court properly dismissed the complaint because the pleading failed to demonstrate factually in the most preliminary fashion that any Plaintiff-Appellant suffered a deprivation of any right, privilege or immunity protected either by the Constitution or the laws of the United States. As such, the conclusory allegations contained in the complaint were wholly insubstantial, frivolous and without merit and were insufficient to confer jurisdiction on the District Court. Spiesel v. City of New York, 239 F. Supp. 106 (S.D. N.Y. 1964), aff'd, 342 F.2d 800 (2d Cir. 1965), cert. denied, 382 U.S. 856 (1965); Bell v. Hood, 327 U.S. 678 (1946); Powell v. Workman's Compensation Board of State of New York, 327 F.2d 131 (2d Cir. 1964); Oliver v. Donavan, 293 F. Supp. 958 (S.D.N.Y. 1968); Fed. Rules of Civ. Proc., Rule 8, 28 U.S.C.A.

In essence, the complaint asserted that in March, 1975, the Calendar Clerk "wrongfully rejected" Plaintiffs-Appellants' Note of Issue (with a jury demand) and their statement of readiness, both of which were presented to the Calendar Clerk's office in connection with the State Action

and that by filing a Note of Issue and statement of readiness almost three years earlier in July, 1972, -- which Plaintiffs-Appellants caused to be vacated -- Defendants-Appellees Chase, Cohen and Breakstone in some unexplained fashion contributed to or caused the action of rejection to be taken by the Calendar Clerk.

Using the foregoing as a departure point, the complaint concluded that various violations of Plaintiffs-Appellants' rights protected by (a) the Constitution of the United States; (b) the New York State Constitution; and (c) New York State's Civil Practice Law and Rules, respectively, were violated. Nevertheless, by reason of the failure to allege any facts which described either the nature of any particular right or any facts which described the manner in which such a violation occurred, the complaint was fatally defective.

For example, in regard to Plaintiffs-Appellants' alleged claim under the Fifth Amendment to the Constitution, that Amendment provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

While it was impossible to ascertain from the complaint in what manner Plaintiffs-Appellants claimed their rights under the Fifth Amendment were violated, significantly, the Fifth Amendment applies only to the acts of the Federal Government and cannot form the basis of a civil claim against a state, municipality or individual. Spiesel v. City of New York, 239 F.Supp. 106, 108 (S.D.N.Y. 1964), aff'd, 342 F.2d 800 (2d Cir. 1965), cert. denied, 382 U.S. 922 (1965); Bell v. Hood, 71 F.Supp. 813, 818 (S.D.Cal. 1947)

In addition, the conclusory allegations which seemed to suggest that Plaintiffs-Appellants had been deprived of their rights to a jury trial under the Seventh or Fourteenth Amendments to the Constitution of the United States, were also inapposite by reason of the fact that such Amendments apply only to civil actions in United States' courts and not to civil actions in state courts. Olesen v. Trust Co. of Chicago, 245 F.2d 522 (7th Cir. 1955), cert. denied, 355 U.S. 896 (1957). As Judge Wyatt noted in his decision dismissing the complaint:

> "The claims in this action rest on a refusal by a calendar clerk in the New York Supreme Court to accept a note of issue with a jury demand by plaintiffs in an action by plaintiffs which is pending in the State Court.
>
> "It is perfectly clear, however, that no federal question is involved in this action. The guaranty of a jury trial in civil actions, found in the Seventh Amendment, applies only to trials in federal courts. In civil actions, the state may modify trial by jury or abolish it altogether. Olesen v. Trust Company of Chicago, 245 F.2d 522 (7th Cir.), cert. denied, 355 U.S. 896 (1957)." [A34]

Similarly, there was no merit to the complaint's conclusory assertions that Plaintiff-Appellants' rights under the Thirteenth Amendment had been violated. In this regard, the term "involuntary servitude" as used in the Thirteenth Amendment was intended to apply to those forms of compulsory labor akin to slavery. Atlanta Motel v. U.S., 379 U.S. 241, 261 (1964); Butler v. Perry, 240 U.S. 328, 332 (1916). At best, the allegations of the complaint merely suggested that Plaintiffs-Appellants attempted to file a Note of Issue and statement of readiness and were rejected by the Calendar Clerk and that Plaintiffs-Appellants successfully obtained an order in the State Action vacating a note of issue and statement of readiness filed by certain Defendants-Appellees in this action; the complaint did not suggest any facts that any Plaintiff-Appellant was subjected to anything remotely similar to compulsory labor or slavery.

With respect to the complaint's allegations under Article III, Section 2 of the Constitution of the United States, that Article relates to the judicial power of the United States and had no possible application to the matters raised in the complaint dealing with the State Action. Moreover, as in the other instances, the complaint set forth no description of the nature of the right which it is claimed was violated by Defendants-Appellees nor any facts describing how any purported derrogation of an alleged right occurred.

Regarding the allegation of the complaint which asserted a purported violation of the Ninth Amendment of the Constitution of the United States, the complaint was also fatally defective because it provided absolutely no factual data or other description setting forth the nature of the right which was purportedly violated nor did it set forth any allegation describing the nature of any such abrogation.

In view of the foregoing, the complaint failed to set forth any information which demonstrated that the District Court should for any reason exercise any power prescribed under the statutory provisions relating to declaratory judgments (28 U.S.C.A. §§ 2201, 2202). To this end, it is well established that these statutes by themselves provide no basis for jurisdiction of the Court. Sellers v. Regents of University of Cal., 432 F.2d 493 (9th Cir. 1970), cert. denied, 401 U.S. 981 (1971). Under such circumstances, the District Court properly dismissed the complaint. Topp-Cola v. Coca-Cola Co., 314 F.2d 124 (2d Cir. 1963). (Parenthetically, the jurisdiction requirements of the Constitution of the United States pertaining to diversity of citizenship were also not met by the complaint because it alleged that Plaintiffs-Appellants and Defendants-Appellees Chase, Breakstone and Calendar Clerk were all citizens of New York. Woodhouse v. Budwesky, 70 F.2d 61 (4th Cir. 1934), cert. denied, 293 U.S. 573 (1934); Green v. Santa Fe Industries Inc., 391 F. Supp. 849 (S.D.N.Y. 1975); 28 U.S.C.A. §1332).

Finally, the references in the complaint to the New York State Constitution (Article I, Section 2) and to New York's Civil Practice Law and Rules (§§ 601; 4100; 4102) also failed to specify any details about the nature of the claimed wrongs. As in the other instances, the complaint's conclusory allegations relating to purported violations of constitutional and other unspecified rights were patently insufficient. Snowden v. Hughes, 321 U.S. 1 (1943); McGuire v. Todd, 198 F.2d 60 (5th Cir. 1952); Fed. Rules of Civ. Proc., Rule 8, 28 U.S.C.A.

CONCLUSION

The Judgment of the District Court should be affirmed, with costs.

Respectfully submitted,

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